Supreme Court, U.S.
FILED

031112 JAN 28 2004

No.

IN THE

Supreme Court of the United States

DAWN EDLUND,

Petitioner,

v.

BOB RYAN MOTORS, INC.,
a Minnesota corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Federal Odometer Law, 49 U.S.C. § 32710, *et seq.*, expressly mandates an award of reasonable costs and attorney's fee to a prevailing plaintiff, and a federal court--*every* federal court--has a fundamental responsibility to enforce congressional legislation and may not exercise its inherent power in a way which conflicts with constitutional or statutory provisions.

The questions presented are:

1. Whether the Eighth Circuit erred when it refused to require the district court to comply with its clear, ministerial, and nondiscretionary duty to award petitioner her statutorily-mandated attorney's fees and costs.

2. Whether the district court's failure to comply with its clear, ministerial, and nondiscretionary duty to award petitioner her statutorily-mandated attorney's fees and costs deprived petitioner of property in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioner Dawn Edlund is a resident of Minnesota and an electrical engineer employed by Medtronic, Inc., in Fridley, Minnesota.

On May 15, 1999, respondent Bob Ryan Motors, Inc., d/b/a Bob Ryan Ford in Minnetonka, Minnesota, sold a two-year-old 1997 Ford Mustang GT convertible to petitioner. Respondent is a non-public Minnesota corporation, the sole shareholder of which is Thomas Ryan. In December 1999, respondent sold the assets of its Ford dealership to Ridgedale Automotive, Inc., which changed the name of the dealership to Morrie's Minnetonka Ford. Petitioner initially sued Ridgedale Automotive and later joined respondent with leave of court, after which petitioner pursued her case only against respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Montgomery, J.) precluding petitioner from applying for statutorily-mandated costs and attorney's fees (Appendix ("Pet. App.") 4a-8a) is not otherwise published. The court of appeals' order (per Arnold, Bye, and Smith, JJ.) denying petitioner's petition for a writ of mandamus without opinion (Pet. App. 3a) and its order denying petitioner's petition for rehearing and rehearing *en banc* (*id.* 2a) are not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its orders denying petitioner's petition for a writ of mandamus without opinion on September 19, 2003, and its order denying petitioner's petition for rehearing and rehearing *en banc* on October 30, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provision of the Federal Odometer Law relevant to this petition is 49 U.S.C. § 32710, which provides:

> (a) *Violation and Amount of Damages.* Any person who, with the intent to defraud, violates any requirement imposed under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500,

whichever is greater.

(b) *Civil Actions.* A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction. The action must be brought not later than 2 years after the claim accrues. The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.[1]

The provision of the United States Constitution relevant to this petition is the Due Process Clause of the Fifth Amendment, which provides:

No person shall be . . . deprived of . . . property, without due process of law; . . . .

STATEMENT OF THE CASE

On Saturday, May 15, 1999, petitioner bought a 1997 Ford Mustang GT convertible from respondent Bob Ryan Motors, Inc., d/b/a Bob Ryan Ford. The odometer mileage was 9,239 at the time of the sale. petitioner immediately discovered that the odometer logged miles intermittently, and her extensive and extensively documented attempts to resolve the problem over the ensuing six months were stonewalled by respondent's employees and its president and sole shareholder, Thomas Ryan. Immediately after buying the Mustang, *e.g.*, petitioner took an 800-mile trip and noticed that the odometer logged only 117 miles. App. 3a. On June 16, 2000, petitioner commenced a lawsuit

[1] In 1994, the words "The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person" were substituted for "in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney's fees as determined by the court" for clarity. Pub. L. 103-272, Sec. 1(e), July 5, 1994, 108 Stat. 1055.

under the Federal Odometer Law, 49 U.S.C. §§ 32701, et seq., initially suing only Ridgedale Automotive, Inc., d/b/a Morrie's Minnetonka Ford, and later joining respondent with leave of court after learning that respondent had sold the assets of its Bob Ryan Ford dealership to Ridgedale Automotive in December 1999.

Sixteen months later and following a five-day trial that began on Wednesday, October 3, 2001, the jury returned a verdict which found that respondent failed to provide petitioner with an accurate written odometer disclosure statement, that respondent did so with an intent to defraud petitioner, and that petitioner sustained damages of $13,000 as the result of respondent's violation of the Federal Odometer Law. It was shown at trial that the Mustang, which had been on lease for two years prior to petitioner's purchase, actually had travelled 25,000-30,000 miles before petitioner bought it and that respondent knew but failed to disclose that the odometer mileage was inaccurate when it sold the Mustang to petitioner.

However, on Friday, September 28, 2001, five days before the trial was to begin (and did begin), the magistrate judge convened a telephonic conference to determine whether petitioner's substitution of new tires for the four bald tires changed the condition of the Mustang and affected the ability of respondent's experts to inspect the vehicle. He said in pertinent part:

> I'd like both of you to come in and see me [three days hence on Monday, October 1, 2001].
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> Mr. Stanbury, the order was in March and I'd like you to present some testimony either by affidavit or by you at least presenting as an officer of the court what the condition was of the vehicle in March versus when the

> inspection took place in September. And I'd also like the defense to tell me, either by affidavit or by testimony, as to the importance of the tires *vis-a-vis* an odometer issue. If in fact, the size of the tires or condition of tires materially affects the odometer reading. I want to know about that and I'm going to give you an opportunity to make a record of that.
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> I'm also going to tell you that I'm considering imposing sanctions or at least recommending that Judge Montgomery consider sanctions if indeed I think that plaintiff [has] not fairly presented that vehicle for inspection following my order of March, including, but not limited, ordering that any expert testimony being offered by plaintiff be not allowed at the trial of this matter, and I'm just going to be up-front with both of you.

Conference Transcript, pp. 3-4 (D. Minn. Docket No. 203).

At a two-hour hearing held on the following Monday, petitioner's expert, Paul Brand, showed that, *inter alia,* the replacement of the bald tires had a negligible effect on the number of miles logged by a properly functioning odometer. And petitioner's attorney informed the magistrate judge that, as the result of a collision with a deer about six weeks before, the left front fender of the Mustang had been damaged and repaired. At the conclusion of the hearing, the magistrate judge said in pertinent part:

> It sounds as though the defendant now has before it the repair and the estimates from the August 14 deer-vehicle accident and the tires will be delivered to the defendant

> shortly. ***I'm not entirely convinced, given the record I had today, that there's been all that much prejudice to the defendants by virtue of the late disclosures. So I'm NOT going to make a report and recommendation to Judge Montgomery that the plaintiff's case be dismissed or that such other draconian sanctions be imposed. It may indeed be the case that some sanctions should be imposed, but I'll leave that up to Judge Montgomery.*** I'm happy to at least see that the repair estimates from the August accident are now in place, that the tires will be delivered to [Morrie's Minnetonka Ford] auto body shop by this afternoon, and that this matter will proceed to trial on Wednesday as scheduled.

Hearing Transcript, p. 74 (D. Minn. Docket No. 204) (emphasis added).

In the late afternoon of the following day and thus only sixteen hours before the trial was to begin and did begin, the magistrate judge issued a vitriolic Report and Recommendation ("R&R") in which he recommended that petitioner's attorney should be precluded from applying for statutory attorney's fees "for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of Civil Procedure." In complete and inexplicable contrast to the substance and tone of what he said at the end of the hearing held only 24 hours earlier, the magistrate judge wrote in pertinent part in the R&R:

> Plaintiff counsel's conduct in this matter warrants significant sanctions which may be imposed by the Court ***in the exercise of its inherent power*** to control litigation. West v. Goodyear Tire & Rubber Co., 167 F.3d 776

(2d Cir. 1999).

5. Under the circumstances now presented to the Court, the sanction of dismissal of all claims would be unduly harsh where it has not been shown that certain discovery violations are materially adverse to the defense or will decisively prejudice defendant's case. Id. at 779.

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*

The Court therefore concludes that the appropriate sanction in this matter is plaintiff counsel's forfeiture of any statutory attorney fees which might have been claimed or assessed in the event plaintiff prevails in this action.

Pet. App. 13a (emphasis added); full text at Pet. App. 9a-13a.

Three days after the jury returned its verdict, petitioner filed a timely objection to the R&R and requested a hearing pursuant to Fed. R. Civ. P. 72(a) and D. Minn. Loc. R. 72.1(c)(2). On December 7, 2001, two months after the jury returned its verdict, the trial judge issued a Memorandum Opinion and Order in which she trebled the jury's damage award as required by 49 U.S.C. § 32710(a), ordered entry of judgment in the amount of $39,000, and summarily denied petitioner's objection to the R&R, saying only:

> Plaintiff objects to the October 2, 2001, R&R of Judge Boylan. The R&R recommends that 'as a sanction for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of' Civil Procedure, Plaintiff's counsel be precluded from asserting any claim for attorney fees in this action which might otherwise be assessed or due pursuant

> to state or federal statute.' R&R at 4. Judge Boylan's R&R is well reasoned and appropriate, and it is accepted in full. Plaintiff's Objection is denied.

Pet. App. 6a; full text at Pet. App. 4a-8a.

And then, *sua sponte* and ***without a hearing***, the trial judge ruled that "[B]ecause Plaintiff's counsel has been precluded from asserting any claim for attorney fees, [plaintiff's] Application for Costs and Litigation Expenses is moot." Id.

Precluding petitioner's attorney from applying for statutorily-mandated attorney's fees imposed a monetary sanction on petitioner because, under 49 U.S.C. § 32710(b), it is the prevailing plaintiff who is entitled to and applies for the mandated attorney's fees. Precluding her attorney from applying for attorney's fees obliged petitioner to pay an amount of attorney's fees required by her contract with her attorney, which itself was a sanction, and, not surprisingly, the fee received by petitioner's attorney was not even remotely proportional to the time and effort he expended and continues to expend on petitioner's righteous case. His unrecovered fees now amount to almost $100,000. And the district court's refusal to award petitioner her statutorily-mandated costs imposed an inherent power sanction which now amounts to more than $12,000.

Petitioner petitioned the Eighth Circuit for a writ of mandamus on June 5, 2003. Respondent answered, petitioner replied, and then the Eighth Circuit denied the petition without opinion on September 19, 2003. Petitioner's motion for a rehearing *en banc* was denied without opinion on October 30, 2003.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

Mandamus is only appropriate when the claim is

"clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992). Mandamus is undeniably appropriate in the instant case where the *awarding*[2] of attorney's fees and costs mandated by a statute of the United States is a ministerial act and where petitioner's entitlement to such an award could not have been more clearly prescribed than it is in 49 U.S.C. § 32710(b).

The district court's resort to its inherent power to impose sanctions in the form of preclusions of statutorily-mandated attorney's fees and costs was in flagrant conflict with and in inexcusable disregard for constitutional and statutory provisions, Supreme Court precedents, rules of civil procedure, and thus the oath taken by all federal judges. "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ ***under the Constitution and laws of the United States. So help me God***" 28 U.S.C. § 453 (emphasis added). In other words, the district court did what a district court is not allowed to do and did not do what a district court has a clear, ministerial, and nondiscretionary duty to do.

A very instructive analysis can be found in *Ingalls Shipbuilding v. Asbestos Health Claimants, et al.*, 17 F.3d 130 (5th Cir. 1994), even though Ingalls was decided on the Mandamus and Venue statute rather than the All Writs Act because the issue confronting the Fifth Circuit

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[2] As distinguished from the separate, subsequent, and discretionary determination of the reasonableness of whatever amounts of fees and costs would be claimed by petitioner following the *awarding* of fees and costs.

was whether the district court appropriately issued a writ of mandamus to a U. S. agency.[3] The Fifth Circuit in that case affirmed the district court's issuance of a writ of mandamus compelling the agency to hold a hearing as statutorily required upon the request of a party. Ingalls had repeatedly requested such a hearing to no avail. The agency did not seriously dispute the mandatory nature of its duty to schedule a hearing if requested but contended, inter alia, that it had discretion to delay the performance of that duty. *Id.* The Fifth Circuit disagreed with that and all of the agency's other excuses and affirmed the district court's issuance of the writ of mandamus, holding in pertinent part:

> [I]f it becomes apparent that the claims cannot be settled amicably, or on application of an interested party, the Director's discretion ends and she must refer the case to the OALJ for a hearing. This is clear from the governing regulations which state that
>
> > [I]f [the Director] is satisfied that any further conference would be unproductive, or if any party has requested a hearing, the [Director] *shall* prepare the case for transfer to the Office of the Chief Administrative Law Judge. 20 C.F.R. § 702.316 (emphasis supplied in *Ingalls*, 17 F.3d at 134).

The district court in the instant case cannot seriously dispute the nature of its mandatory duty to award attorney's fees and costs under the

[3] "Action to compel an officer of the United States to perform his duty. The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

circumstances but revealed by its actions that it believes that its inherent power is an unbounded power which trumps anything Congress might mandate and permits a court to disregard the considered limitations of the law it is charged with enforcing and which every federal judge has sworn before God to enforce. Simply put, the district court chose to impose unlawful sanctions which are as unjustifiable as it would have been if the district court had ordered petitioner, her attorney, or both of them to go jump in the lake. As held by the this Court in *United States v. Paynor*, 447 U.S. 727, 737 (1980), the inherent power "does not extend so far."

I. Certiorari Is Warranted Because The District Court Had A Clear, Ministerial, And Nondiscretionary Duty To Award petitioner Her Statutorily-Mandated Attorney's Fees.

The district court's unsupportable imposition of sanctions in the form of a preemptive forfeiture of statutorily-mandated costs and attorney's fees is in flagrant conflict with Supreme Court precedents and constitutional and statutory provisions. Citing this Court's holding in *Bank of Nova Scotia v. U. S.*, 487 U.S. 250, 254 (1988), the Seventh Circuit held that ***"[C]ourts may not exercise their inherent powers in a way that actually conflicts with constitutional or statutory provisions."*** *Kovilic Construction Co., Inc. v. Missbrenner*, 106 F.3d 768, 772 (7th Cir. 1997) (emphasis added). In *Bank of Nova Scotia*, this Court held that a federal court may not invoke its inherent power to circumvent the harmless-error inquiry prescribed by Fed. R. Crim. P. 52, and observed:

> It follows that Rule 52 is, in every pertinent respect, as binding as any statute enacted by Congress, and ***federal courts have no more discretion to disregard the Rule's mandate***

> ***than they do to disregard constitutional or statutory provisions.*** The balance struck by the Rule between societal costs and the rights of the accused may not be overlooked 'because a court has elected to analyze the question under the supervisory power.' *United States v. Paynor, supra,* at 736.

487 U.S. at 255 (emphasis added).

In *United States v. Paynor,* 447 U.S. 727 (1980), wherein this Court ruled that the district court erred when it invoked its inherent power to suppress evidence even though an illegal search did not violate the accused's Fourth Amendment rights, this Court held in pertinent part:

> The District Court erred, therefore, when it concluded that 'society's interest in deterring [bad faith] conduct by exclusion outweigh[s] society's interest in furnishing the trier of fact with all relevant evidence.' 434 F.Supp. at 135. This reasoning, which the Court of Appeals affirmed, amounts to a substitution of individual judgment for the controlling decisions of this Court. ***Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.*** We hold that the supervisory power does not extend so far.

Id. at 737 (emphasis added).

In *Thomas v. Arn,* 474 U.S. 140 (1980), wherein this Court affirmed the denial of the petitioner's right to appeal for failing to file objections to the magistrate judge's report as required by the Sixth Circuit's facially-sensible rule requiring objections to be filed within 10 days, this Court observed in pertinent part:

> ***Even a sensible and efficient use of the supervisory power, however, is invalid if it***

> ***conflicts with constitutional or statutory provisions.*** A contrary result 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. *United States v. Payner*, 447 U.S. 727, 737 (1980). Thus, we now consider whether the Sixth Circuit's waiver rule conflicts with statutory law or with the Constitution.

Id. at 148 (emphasis added).

And in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), wherein this Court rejected the D. C. Circuit's reliance on inherent power to uphold a dismissal of a complaint for failure to comply with a production order, this Court held in pertinent part: ***"[T]here are constitutional limitations upon the power of courts, even in the aid of their own valid purposes,*** to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.* at 209 (emphasis added), citing, *Hovey v. Elliot*, 167 U.S. 409 (1897) and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909). The Ninth Circuit recognized that fundamental principle in *Freestone v. Cowan*, 68 F.3d 1141, 1150 (9th Cir. 1995):

> The availability of a § 1983 action to enforce statutory rights is well settled. ***Given our responsibility to enforce congressional legislation and to respect binding Supreme Court precedent,*** there can be no legitimate question as to the conclusion we must reach in this case. We join the First and Eighth Circuits in holding that § 1983 is available and reverse. (Emphasis added.)

The general rule (*i.e.*, the "American Rule") is that, absent statute or enforceable contract, litigants pay their own attorney's fees. *F. D. Rich Co., Inc. v. United States*, 417 U.S. 116, 128-131 (1974). However, while

fully recognizing and accepting the general rule, Congress has made specific and explicit provisions for the allowance of attorney's fees under selected statutes granting or protecting various federal rights. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260 (1975). These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves by ranging from discretionary to mandatory. *Id.* at 260-261. This Court has observed that "under the scheme of things, it is apparent that the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making these awards ***are matters for Congress to decide.***" *Id.* (emphasis added).

An award of attorney's fees and costs to a prevailing plaintiff is mandatory in a Federal Odometer Law action ("The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person."). 49 U.S.C. § 32710(b) (emphasis added). In *People of Sioux County, Nebraska v. National Surety Company*, 276 U.S. 238, 243 (1928), a diversity action that had been removed from state court, this Court reversed the Eighth Circuit's disallowance of an award of attorney's fees which was mandated by a Nebraska statute, holding in pertinent part:

> [I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made the policy effective by making the allowance of the fee ***mandatory*** on its courts in those cases. It would be anomalous if this policy could be thwarted and the right so plainly given destroyed by removal to the federal courts. (Emphasis added.)

It would be anomalous indeed if the mandates of 49 U.S.C. § 32710(b) or any other statute granting or protecting federal rights could be thwarted and the

right so plainly given destroyed by the judicial fiat of the sort witnessed in the instant case and inexplicably countenanced by the Eighth Circuit. The remedial purposes of the Federal Odometer Law would be eviscerated if practitioners who otherwise would be inclined to take on such cases were to learn that a client's entitlement to statutorily-mandated attorney's fees and costs might be forfeited at any stage of the litigation upon the slightest discovery or disclosure violation, even if, as conceded by the district court in the instant case, the ostensible violation was immaterial and non-prejudicial. Vindication of federal rights would be discouraged. If practitioners and aggrieved parties alike cannot trust the courts to enforce and abide by the laws as written, we are all lost. *See, e.g.*, App. 3a-4a (Affidavit of Dawn Edlund dated June 4, 2003). As prescribed by 49 U.S.C. § 32710(b), the district court had a clear, ministerial, and nondiscretionary duty to award to petitioner her reasonable attorney's fees and costs. This case accordingly merits the Court's immediate review.

II. Certiorari Is Warranted Because The District Court Had A Clear, Ministerial, And Nondiscretionary Duty To Award petitioner Her Statutorily-Mandated Costs.

In further disregard for its responsibility to enforce the mandates of a United States statute, the district court precluded petitioner from applying for costs and litigation expenses because and only because her attorney had been precluded from asserting any claim for statutory attorney's fees. Pet. App. 7a ("[B]ecause Plaintiff's counsel has been precluded from asserting any claim for attorney fees, the Application for Costs and Litigation Expenses is moot."). That is beyond illogical. That imposed an inherent power sanction which now amounts to more than $12,000

without even bothering to hold a hearing.

The discretion as to the allowance of costs which the district court ordinarily would have had under Fed. R. Civ. P. 54(d) was taken away by 49 U.S.C. § 32710(b). Rule 54(d) is clear: The general discretion of the trial court with regard to costs is subordinated "when express provision therefor is made either in a statute of the United States or in these rules." The general federal statutes on fees and costs are in 28 U.S.C. §§ 1911-1929. Such an express provision mandating an award of costs is made within the Federal Odometer Law at 49 U.S.C. § 32710(b) ("The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.") (emphasis added). Thus the discretion as to the allowance of costs which the district court ordinarily would have had in the instant case under Fed. R. Civ. P. 54(d) was taken away by the mandating language of 49 U.S.C. § 32710(b).

The district court nevertheless denied as moot petitioner's application for those statutorily-mandated costs because *and only because* petitioner had been precluded from asserting any claim for statutory attorney's fees. In *Assoc. of W. Railways v. Riss & Co.*, 320 F.2d 785 (D.C. Cir. 1963), e.g., the D. C. Circuit understood what the district court in the instant case did not. In Riss, the federal district court had refused to allow costs to the prevailing parties, and that exercise of discretion was challenged on appeal. The appellants argued that the D. C. Code mandating costs to the prevailing party was a statute of the United States and thus took from the trial judges in that jurisdiction the discretion as to the allowance of costs which they otherwise had under Rule 54(d). Id. at 786. The D. C. Circuit agreed with the appellants' reasoning but affirmed the disallowance of costs upon finding that the D. C. Code was not a statute of the United States, after observing in pertinent part:

> It follows that, **IF** § 1517 of the District Code is actually a Congressional enactment in force in the District of Columbia, it is a 'statute of the United States' which, contrary to the generality of Rule 54(d), does not give a trial judge discretion, but ***requires*** the allowance of costs to the prevailing party.

Id. (emphasis added).

There was no *nexus* between petitioner's mandated right to an award of costs and the district court's preclusion of an award of statutory attorney's fees. As prescribed by Rule 54(d) in conjunction with 49 U.S.C. § 32710(b), the district court had a clear, ministerial, and nondiscretionary duty to award to petitioner her litigation costs. This case accordingly merits the Court's immediate review.

III. Certiorari Is Warranted Because The District Court's Impermissible Exercise Of Its Inherent Power Deprived petitioner Of Property In Violation Of The Due Process Clause of the Fifth Amendment To The United States Constitution.

Upon prevailing at trial, petitioner succeeded to a protected, cognizable property interest in the form of a clear entitlement to an award of attorney's fees and costs. A claim of entitlement under [federal] law, to be enforceable, must be derived from statute or legal rule or through a mutual understanding. *Perry v. Sinderman,* 408 U.S. 493, 601-602 (1972). petitioner's entitlement was "clear" because it was mandated by 49 U.S.C. § 32710(b) in the event she prevailed at trial. Accordingly, because petitioner possessed cognizable property interests within the terms of the Fifth Amendment, the Constitution obligated the district court to afford her procedural due process before depriving her of her property interests in costs and

attorney's fees. That was not done.

The Due Process Clause of the Fifth Amendment asserts that no person shall "be deprived of life, liberty, or property without due process of law." The Constitution does not create property interests but instead extends various procedural safeguards to certain interests "that stem [as in the instant case] from an independent source such as a [federal] law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). When presented with a due process challenge, a court must determine, first, whether there has been a deprivation of a property interest, and, if so, what process is due. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Even when permissible, inherent power sanctions may not be imposed unless the procedure leading to the assessment comports with due process. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 and n. 14 (1980). If due process rights are violated, any sanctions award will be reversed. *Glass v. Pfeffer*, 657 F.2d 252, 257-58 (10th Cir. 1981). Neither petitioner nor her attorney were afforded adequate notice and an opportunity to be heard before the sanctions were entered. Due process requires, in the absence of extraordinary circumstances, notice and an opportunity to be heard before sanctions are imposed. *Eash v. Riggins Trucking, Inc.*, 767 F.2d 557, 570 (3d Cir. 1985). This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Notice for due process purposes entails awareness of (1) the fact that sanctions are under consideration, (2) the reasons why they are under consideration, and (3) the type of sanctions being considered. *In re Tutu Wells Contamination Litig.*, 120 F.3d.368 (3d Cir. 1997) (emphasis added).

The district court precluded petitioner from applying for statutory costs without providing notice and an opportunity to be heard. That inherent power

sanction was not recommended in the R&R, and petitioner did not receive any other warning that the imposition of such a sanction was being considered. petitioner did not learn of its imposition until the issuance of the Memorandum Opinion and Order which precluded petitioner from applying for statutory costs because and only because her attorney had been precluded from applying for statutory attorney's fees. Whatever procedure may be fashioned, the failure to provide the offender with an opportunity to be heard will require reversal. *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1211 (11th Cir. 1985).

Although the issuance of the R&R was preceded by a hearing, that hearing did not comport with due process. Neither petitioner nor her attorney were afforded adequate notice and an adequate opportunity to be heard before the R&R was issued and then "adopted in full" by the trial judge. The hearing was convened solely to determine whether the substitution of new tires for the four bald tires changed the condition of the Mustang and affected the ability of respondent's experts to inspect the vehicle. The hearing was not convened pursuant to any kind of motion. petitioner and her attorney were notified that sanctions were being considered and why, but the only type of sanction which was said to be under consideration was evidence exclusion, specifically the exclusion of petitioner's expert report. Petitioner responded accordingly by calling her expert to testify, and, consonant with the magistrate judge's wish to be told of any other changes in the condition of the Mustang between March 2001 and respondent's inspection in September 2001, petitioner's attorney forthrightly informed the magistrate judge of the Mustang's collision with a deer and subsequent repairs.

Where no inquiry was made or testimony adduced as to the subjective intent of petitioner's attorney in not disclosing the tire replacement and the

collision with a deer, the magistrate judge's recitation of bad faith was talismanic. *See generally* G. P. Joseph, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (3d ed. 2000 & Supp. 2002) § 27. And the magistrate judge refused to hear any argument concerning the alleged failure of petitioner to comply with the inspection order of March 14, 2001. Hearing Transcript, pp. 68-69 (D. Minn. Docket No. 204).

Neither petitioner nor her attorney were called upon or afforded an opportunity to justify the failure to disclose the tire replacement and the collision with a deer nor the opportunity to show that any particular court order was not disobeyed. Moreover, prior to and at the hearing on October 1, 2001, neither petitioner nor her attorney were told that a forfeiture of statutory attorney's fees was being considered, and indeed, as noted supra, the magistrate judge told them at the conclusion of the hearing that draconian sanctions were not warranted and that he was going to leave it to the trial judge to decide if any sanctions would be imposed. The ordered forfeiture of statutory attorney's fees was draconian by any measure, amounting as they now do to almost $100,000.

Petitioner and her attorney were denied procedural due process in another way. By all appearances, the R&R was written at the direction of or in collaboration with the trial judge. The starkly suspicious contrast between what the magistrate judge said at the hearing on October 1, 2002, and what he wrote in the R&R just does not compute and discourages any other conclusion. If true, a mockery was made of the procedural opportunities supposedly afforded by Fed. R. Civ. P. 72(a) and 8th Cir. R. 72.1(c)(2) to a party aggrieved by a magistrate judge's recommendation, and the trial judge's cursory conclusion that the magistrate judge's R&R was "well-reasoned and appropriate" was a self-congratulatory charade and not the product of a required *de novo*

review. *See* Advisory Committee Notes to Rule 72(a) ("Implementing the statutory requirements, the rule requires the district judge to whom the case is assigned to make a *de novo* determinations of those portions of the report, findings, or recommendations to which timely objection is made.") (emphasis added). petitioner's Objection was timely and specified the objectionable portions of the R&R with precision. This case accordingly merits this Court's immediate review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, DATED SEPTEMBER 19, 2003

***

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-2474

In re: Dawn Edlund,	*	Order Denying
Petition	*	for Rehearing and for
Petitioner.	*	Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 30, 2002

Order entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED OCTOBER 30, 2003

***

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-2474

In re: Dawn Edlund, *
*
Petitioner. *

Petition for Writ

Petition for writ of mandamus has been considered by the court and is denied.

September 19, 2003

Order entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C: AFFIDAVIT OF DAWN EDLUND IN SUPPORT OF PETITION TO 8TH CIRCUIT FOR WRIT OF MANDAMUS, DATED JUNE 4, 2003

***

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. _____

In re: DAWN EDLUND,	)	**AFFIDAVIT OF DAWN EDLUND**
Petitioner.	)	

The undersigned, on oath, deposes and says:

1, I am the plaintiff in the case of Dawn Edlund v. Ridgedale Automotice, Inc., and Bob Ryan Motors, Inc., (D. Minn. 00-1478).

2. I submit this affidavit in support of my petition for a writ of mandamus requiring the district court to award me the costs and reasonable attorney's fees to which I became entitled when I prevailed in that case.

3. I am an electrical engineer employed by Medtronic, Inc., in Fridley, Minnesota.

4. I retained Alfred Stanbury to investigate, commence, and represent me in a lawsuit against Bob Ryan Ford after being stonewalled and rudely treated by Ryan Ford's employees and its president, Thomas Ryan, for six months after I discovered that the odometer in a used car I purchased functioned intermittently.

5. For example, immediately after I bought the car, I drove it on an 800-mile trip, and the odometer

logged only about 117 miles, and it has functioned intermittently ever since.

6. I commenced the lawsuit with the knowledge that, if I prevailed, as I confidently believed I would, I would be entitled under the law to an award of reasonable attorney's fees and a reimbursement of my litigation costs.

7. As confident as I was that the car had been driven far more miles than the 9,000 showing on the odometer when I bought the car, I would not have commenced the lawsuit if there had been no law which guaranteed a recovery of attorney's fees and costs if I prevailed.

8. The litigation promised to be difficult and expensive to prosecute because, if for no other reason, Bob Ryan Ford's assets were sold and its records and employees scattered about seven months after I bought the car.

9. I trusted the law, never thinking for a moment that the court, by failing to enforce the law, would betray my trust and what I understood to be the oath of office taken by all federal judges.

FURTHER AFFIANT SAYETH NOT.

s/Dawn Edlund

Subscribed and sworn to before me this 4th day of June, 2003.

s/Rebecca Catherine Fletcher
Notary Public

My commission expires: 1/31/07

APPENDIX D: MEMORANDUM OPINION AND ORDER OF UNITED STATES DISTRICT COURT, DATED DECEMBER 7, 2001

***

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Dawn Edlund,

Plaintiff,

v.

Ridgedale Automotive, Inc., a Minnesota corporation d/b/a Morrie's Minnetonka Ford and f/k/a Bob Ryan Motors, Inc.; Bob Ryan Motors, Inc., a Minnesota corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

Civil No. 00-1478 ADM/AJB

Alfred M. Stanbury, Esq., Stanbuy Law Firm, PA, Minneapolis, MN, on behalf of Plaintiff.
Julianne E. Ortman, Esq., Ortman & Associates, Minnetonka, MN, on behalf of Defendants.

I. INTRODUCTION, BACKGROUND AND DISCUSSION

This case is a saga drawn out to a degree rarely contemplated even in a litigious era. On the basis of a dispute about a single car, a used 1997 Ford Mustang GT convertible with a purchase price of $25,117.12, purchased from a single dealership on May 15, 1999, bearing a single faulty odometer reading 9,239 miles at the time of sale, this Court has witnessed a costly and

time consuming display miring this litigation with motions upon motions, and contentious, tedious arguments throughout. The often frivolous and unnecessary filings have, at great judicial time and expense, generated a case file currently over-filling six folders and two accordion folders, with nearly 200 docketed documents. The landscape of this litigation has further been marked with delay tactics, gamesmanship, and uncooperative behavior that has resulted in imposition of sanctions against Plaintiff's counsel. All over one faulty odometer on a used car that was off by a few hundred miles . . . it is cases like this which spawn the admonition, "don't make a federal case out of it."

Before the Court are multiple post-trial motions from both parties. The facts of this case are well known to the parties and need not be reiterated here. Plaintiff Dawn Edlund submits a Motion for Order for Entry of Judgment [Doc.No. 183]. Plaintiff has also filed an Objection [Doc. No. 176] to the Report and Recommendation ("R&R") [Doc. No. 150] filed on October 2, 2001. by Magistrate Judge Arthur J. Boylan. Plaintiff also submits an Application for Costs and Litigation Expenses [Doc. No. 188]. Defendant Bob Ryan Motors, Inc., submits a Motion for Hearing on Post Trial Issues [Doc. No. 191]. Defendant argues that (l) there were errors at trial warranting a new trial or judgment notwithstanding the verdict, (2) damages awarded by the jury were not supported by the evidence, (3) the jury was encouraged contrary to law to find intent to defraud based upon Defendant's negligence, and (4) Plaintiff's request for costs of $9,303.40 is premature and excessive.

First, after a trial by jury from October 3, 2001, through October 9, 2001, the jury retuned a verdict on October 9, 2001, finding Defendant in violation of the Federal Odometer Law, 49 U.S.C. §§ 37201, et seq., and awarding damages of $13,000. As an operation of law.

49 U.S.C. § 37210 requires that the jury damage award be automatically trebled. Judgment is hereby entered against Bob Ryan Motors. Inc., in the amount of $39,000.

Second, Plaintiff objects to the October 2, 2001, R&R of Judge Boylan. The R&R recommends that "as a sanction for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of' Civil Procedure, Plaintiff's counsel be precluded from asserting any claim for attorney fees in this action which might otherwise be assessed or due pursuant to state or federal statute." R&R at 4. Judge Boylan's R&R is well-reasoned and appropriate, and it is accepted in full. Plaintiff's Objection is denied.

Third, because Plaintiff's counsel has been precluded from asserting any claim for attorney fees, the Application for Costs and Litigation Expenses is moot.

Finally, Defendant's Motion for Hearing is denied. The issues raised by Defendant seeking a judgment notwithstanding the verdict or new trial have been carefully considered and dealt with in the course of trial and need not be re-addressed.

Likewise, Defendant's argument about the propriety of the jury instruction on intent to defraud was resolved during trial. The jury instruction was

appropriately given.[1]

Defendant's argument that damages awarded were not supported by the evidence is unavailing. Plaintiff asked for $6,366 damages in closing argument. However, the jury instruction on damages allowed them to award "the difference between the fair market value of the vehicle in question with its actual mileage and the amount paid for the vehicle by Plaintiff; and such sum as you find will fairly and justly compensate Plaintiff for any of the damages sustained as the result of the conduct of Defendant." The jury award of $13,000 was more than double what Plaintiff's counsel had illustrated on the blackboard were Plaintiffs damages, but was an amount within the discretion of the jury to award. After the statutory trebling, the damage judgment of $39,000 is a handsome compensation for a an odometer discrepancy on a $25,000 car that Plaintiff retains.

Defendant's objection to the premature and excessive nature of Plaintiff's request for costs of $9,303.40 is moot.

II. Conclusion

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[1] The jury instruction read as follows: "To act with the intent to defraud means to act with the intent to deceive or cheat for the purpose of bringing some financial gain to one's self or another. Reckless disregard for the truth in determining or disclosing actual mileage may constitute intent to defraud." While it was argued that Defendant had knowledge of an odometer problem that should have been fixed, no evidence was presented at trial to indicate that Defendant was trying to cheat Plaintiff in order to increase its own profit. However, evidence was introduced suggesting that an employee of Defendant did know about a slight odometer misreading prior to the purchase of the car by the dealership from its prior owner, and that a record of the broken odometer was contained in Defendant's computer files. This evidence was sufficient for the jury's finding.

Based on the foregoing, and all the files, records and proceedings herein, IT IS HEREBY ORDERED that:

I. Plaintiff's Motion for Order for Entry of Judgment [Doc. No. 183] is GRANTED, and judgment is entered against Defendant for $39,000.00;

2. Plaintiff's Objection to the R&R [Doc. No. 176] filed on October 2, 2001, by Magistrate Judge Boylan is DENIED;

3. The R&R [Doc. No. 150] is ACCEPTED. As a sanction for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of Civil Procedure, Plaintiff's counsel is precluded from asserting any claim for attorney fees in this action which might otherwise be assessed or due pursuant to state or federal statute;

4. Plaintiff's Application for Costs and Litigation Expenses [Doc. No. 188] is DENIED AS MOOT; and

5. Defendant's Motion for Heanng on Post Trial Issues [Doc. No. 191] is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

s/ Ann D. Montgomery

ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

Date: December 7, 2001

APPENDIX E: REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE, DATED OCTOBER 2, 2001

***

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Dawn Edlund,

Plaintiff,

v.

Ridgedale Automotive, Inc.,et al.,

Defendants.

Civil No. 00-1478 ADM/AJB

REPORT AND RECOMMENDATION

This matter is before the Court, Magistrate Judge Arthur J. Boylan, for findings, conclusions, and recommendations regarding sanctions against plaintiff's counsel based upon failure to make certain disclosures. Hearing was held on October 1, 2001, at the U.S. Courthouse, 316 No. Robert St., St. Paul MN 55101. Alfred M. Stanbury, Esq., appeared on behalf of the plaintiff. Julianne E. Ortmann, Esq., appeared on behalf of the defendants. The matter is properly before the Magistrate Judge for report and recommendation under 28 U.S.C. §636 and Local Rule 72.1(c).

Based upon the file and documents contained therein, along with affidavits, witness testimony, arguments of counsel, and the Court's previous Orders on discovery, the Court makes the following:

Findings and Conclusions

1. This Court issued an Order on Discovery dated March 14, 2001, therein requiring plaintiff to produce the 1997 Mustang automobile that is the subject of this action for inspection by a expert to be retained by the defendants. Plaintiff's appeal of the Order was dismissed in its entirety by the District Court by Order dated April 27, 2001. Plaintiff's expert examined the vehicle on March 21, 2001, for purposes of forming an opinion regarding the number of miles that the car has been driven that were not recorded on the odometer as a result of malfunction. The expert formed an opinion based upon his calculations on the amount of tire wear and brake pad wear. His opinion is not based upon examination or testing of the odometer itself andthe odometer was not removed or disassembled. The brake pads were the original equipment installed by the manufacturer. Three of the four tires which were measured for tread wear also appeared to be original equipment. The fourth tire was a newer replacement, likely put on the car in the course of repairs following a front-end accident which occurred when the car was in the possession of a previous lessee.

2. Plaintiff produced the vehicle for inspection by defendants' experts on September 20, 2001. The vehicle as produced had four new tires. Defendant's experts were able to evaluate brake pad wear, but were unable to obtain meaningful tire tread wear measurements because of the immediate unavailability of the original tires. An expert for defendants also observed that the steering column appeared to have been previously removed and reinstalled. Plaintiff counsel had not disclosed the fact that new tires had been purchased and mounted on the car on July 10, 2001, subsequent to the expert's examination in March 2001. Hearing was held before the Court on September 10, 2001, at which time plaintiff continued to resist

production of the vehicle for expert inspection. Neither the Court nor the opposing parties were advised at that time that the tires had been changed. Though the original] tires were not destroyed and remain available for inspection, plaintiff counsel's failure to timely produce the original tires for inspection along with the car constitutes an intentional effort to withhold evidence which is material to this acton and was subject to disclosure pursuant to court order and the obligation to supplement responses to defendants' discovery under Fed. R Civ. P. 26(e). Plaintiff is not faulted for replacing worn tires, but counsel's failure to promptly disclose such a material alteration and produce the original equipment for inspection is inexcusable.

3. The 1997 Mustang that is subject of the action was involved in a collision with a deer on August 14, 2001. As a result of the accident the car was damaged on the front driver's side. The damage was promptly repaired. This accident was not disclosed to defendants through discovery, and indeed, was not revealed until hearing in this matter on October 1, 2001. It does not appear ıhat the deer accident has any direct and critical implications with respect to the ability of defendants' experts to inspect the vehicle in regards to brake pad wear and tire tread wear. However, plaintiff was served discovery requests requiring disclosure of accidents and incidents of this nature and is required to supplement discovery responses as appropriate. Plaintiff counsel's failure to timely disclose the collision with a deer and the subsequent repairs to the Mustang was a knowing and intentional effort to evade disclosure obligations.

4. Plaintiff counsel's failure to advise defendants that the tires on the 1997 Mustang had been replaced, failure to produce the original tires for inspection along with the vehicle, and failure to disclose the August 2001, collision with a deer, constitute intentional efforts to avoid required disclosure. Counsel's argument to the

effect that defendants should have deduced the need for tire replacements, is unavailing and is essentially irrelevant to the discovery issue. Likewise with respect to the deer accident, materiality of the incident is separate from the disclosure obligation. Plaintiff counsel's conduct in this matter warrants significant sanction' which may be imposed by the Court in the exercise of its inherent power to control litigation. West v. Goodyear Tire & Rubber Co., 167 F.3d 776 (2d Cir. 1999).

5. Under the circumstances now presented to the Court, the sanction of dismissal of all claims would be unduly harsh where it has not been shown that certain discovery violations are materially adverse to the defense or will decisively prejudice defendant's case. Id. at 779. On the other hand, the Court finds that evidentiary sanctions, including striking all or portions of plaintiff's expert's report and opinion, would unnecessarily and unfairly impair the plaintiff's case as a consequence of counsel's misdeeds and would improperly de-emphasize the nature and significance of counsel's misconduct. Id. at 780. The Court therefore concludes that the appropriate sanction in the matter is plaintiff counsel's forfeiture of any statutory attorney fees which might have been claimed or assessed in the event plaintiff prevails in this action. Such sanction would not be intended to preclude any fees which might be due counsel pursuant to retainer agreement, contract, or other binding arrangement between plaintiff and counsel.

Based upon the foregoing Findings and Conclusions, the Magistrate Judge makes the following:

RECOMMENDATION

It is hereby recommended that as sanction for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of Civil Procedure, plaintiff's counsel be precluded from asserting any claim for attorney fees in

this action which might otherwise be assessed or due pursuant to state or federal statute.

Dated: 10/2/01 s/ Arthur J. Boylan

Arthur J. Boylan
United States Magistrate Judge

Supreme Court, U.S.
FILED
MAR 12 2004
OFFICE OF THE CLERK

(2)

No. 03-1112

IN THE

Supreme Court of the United States

DAWN EDLUND,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA and BOB RYAN MOTORS, INC., a Minnesota corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED FOR REVIEW

The Federal Odometer Law, 49 U.S.C. § 32710, *et seq.*, expressly mandates an award of reasonable costs and attorney's fee to a prevailing plaintiff, and a federal court--*every* federal court--has a fundamental responsibility to enforce congressional legislation and may not exercise its inherent power in a way which conflicts with constitutional or statutory provisions.

The questions presented are:

1. Whether the Eighth Circuit erred when it refused to require the district court to comply with its clear, ministerial, and nondiscretionary duty to award petitioner her statutorily-mandated attorney's fees and costs.

2. Whether the district court's failure to comply with its clear, ministerial, and nondiscretionary duty to award petitioner her statutorily-mandated attorney's fees and costs deprived petitioner of property in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioner Dawn Edlund is a resident of Minnesota and an electrical engineer employed by Medtronic, Inc., in Fridley, Minnesota.

Respondent United States District Court for the District of Minnesota is an Article III court of the United States of America.

On May 15, 1999, respondent Bob Ryan Motors, Inc., d/b/a Bob Ryan Ford in Minnetonka, Minnesota, sold a two-year-old 1997 Ford Mustang GT convertible to petitioner. Respondent is a non-public Minnesota corporation, the sole shareholder of which is Thomas Ryan. In December 1999, respondent sold the assets of its Ford dealership to Ridgedale Automotive, Inc., which changed the name of the dealership to Morrie's Minnetonka Ford. Petitioner initially sued Ridgedale Automotive and later joined respondent with leave of court, after which petitioner pursued her case only against respondent.

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Other Authorities:

Address of Seth P. Waxman, Solicitor General of the United States, to the Supreme Court Historical Society, June 1, 1998. 3

Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (Mar. 1955). 3

INTERVENING MATTER

Upon the filing of the petition for a writ of certiorari, the District Court for the District of Minnesota was added as a respondent by this Court *sua sponte*. Consistent with S. Ct. R. 29.4(a), petitioner thereupon served three copies of the petition on the Solicitor General, whose deadline to respond was March 5, 2004.[1] On March 9, 2004, petitioner's attorney inquired of this Court as to why the Solicitor General's response or waiver did not appear to have been filed and why the district court had never been entered on the docket as a respondent. His questions were put before the Chief Deputy Clerk, who reportedly concluded that the Solicitor General was under no obligation to respond or file a waiver since the district court was only a "nominal" respondent because it had not been a party or a respondent below.

The problem with that is this: Under Fed. R. App. P. 21, as amended in 1996 "in order to change the tone of [Rule 21] and mandamus proceedings generally," a trial judge may not be treated as a respondent on a petition to a court of appeals for a writ of mandamus or prohibition. That is why the petitioner's petition to the Eighth Circuit for a writ of mandamus was captioned *In re Dawn Edlund, Petitioner* rather than *Dawn Edlund, Petitioner v. The Honorable Ann Montgomery, Respondent.* A trial judge would not even become a respondent if invited or ordered by a court of appeals to address the petition pursuant to Fed. R. App. P. 21(b)(4).

As a result, this Court will never confront a case in which the trial judge was made a party or respondent

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[1] On February 23, 2004, the attorney for respondent Bob Ryan Motors waived responding but is not a member of the bar of this Court in any event.

to a petition for a writ of mandamus or prohibition below. By rule it will never occur, and the Solicitor General's obligation to respond or file a waiver on behalf of the district court in this case cannot be properly tied to the occurrence of something that cannot occur.

The Eighth Circuit could have, should have, but did not invite or order the trial judge to address the petition or invite an *amicus curiae* to do so. In that regard, petitioner argued as follows in her petition to the Eighth Circuit for a writ of mandamus:

> If called upon to file an answer to this petition pursuant to Fed. R. App. P. 21(b), neither the respondents' attorney (who is more accurately described as the attorney for respondents' NYSE-delisted and probably[2] insolvent insurance company), the district court judge, nor a hundred *amici curiae* will be able to cite any authorities or circumstances which justify or excuse the district court's failure to comply with its clear, ministerial, and nondiscretionary duty to award prevailing plaintiff Edlund her statutorily-mandated costs and reasonable attorney's fees. The arguments set out herein are incontrovertible. The existence of an inherent power to impose sanctions on an attorney does not excuse what the district court did nor mitigate its seriousness in any way, and the district court's unlawful exercise of its inherent power is not excused or mitigated in the least by [the

[2] Subsequently, the insurance company was indeed liquidated.

> trial judge's] derisive and baseless after-the-fact rationalizations [as set out in the trial judge's Memorandum Opinion and Order at Pet. App. 5a-9a].

On June 1, 1998, Seth P. Waxman, Solicitor General of the United States, addressed the Supreme Court Historical Society and said in pertinent part:

> [T]he Solicitor General's special relationship to the Court is not one of privilege, but of duty -- to respect and honor the principle of stare decisis, to exercise restraint in invoking the Court's jurisdiction, and to be absolutely scrupulous in every representation made. As one of my predecessors, Simon Sobeloff, once described the mission of the office:
>
> > The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice. Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (Mar. 1955).

In this case, however, establishing injustice is the chief business of the Solicitor General's client. Nevertheless, even if that presents the Solicitor General with a dilemma, as it will, a response should be invited because nothing should be of more concern to this

Court than a judge's failure to enforce constitutional and statutory provisions and a judge's disregard for the precedents of this Court which, *inter alia*, put specific limits on the exercise of a court's inherent power.

CONCLUSION

This Court should invite the Solicitor General to file a brief expressing the views of the United States concerning the challenged acts of the district court.

Respectfully submitted,

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